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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-38

No. 958

FEDERAL POWER COMMISSION, *Petitioner*,

v.

FLORIDA POWER & LIGHT COMPANY, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Public Power Association respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae,* in support of the petition for certiorari of the Solicitor General on be-

half of the Federal Power Commission. The attorneys for the petitioner have consented to the filing of this brief, but the attorneys for the respondent, Florida Power & Light Company (FPL), have refused consent.

The applicant, American Public Power Association (APPA), a national service organization, has an interest in this case in that it represents more than 1,400 local, publicly owned electric utilities in 48 States, Puerto Rico, the Virgin Islands and Guam. Many of these publicly owned utilities are directly and seriously affected by the decision in the court below.

The basic issue presented in the Federal Power Commission's petition for certiorari is whether the interconnection of an electric power utility with an interstate transmission grid involves "transmission of electric energy in interstate commerce" and thus makes the utility subject to the Commission's regulatory jurisdiction pursuant to section 201 of the Federal Power Act, 16 U.S.C. 824.

In finding that FPL's interconnection with an interstate transmission grid involved the interconnecting utility in interstate commerce, the Commission relied upon the "electromagnetic unity" theory and the "commingled tracing" theory. This involved a high degree of expertise. The court below overturned the Commission's determination, rejecting the Commission's exercise of its expertise, substituted that proposed by FPL, and held FPL to be free of the Commission's jurisdiction. In short, FPL's election to participate in an interstate power pool, to obtain the benefit of reserve generating capacity in power

systems in other States, in consideration of its dedicating reserve capacity on its own system for use in those other States, was held to have no consequences with respect to interstate commerce, that is, interstate transmission of energy. *Florida Power & Light Company* v. *Federal Power Commission,* Op. No. 24956 (5th Cir., July 13, 1970).

The decision below leaves the Commission with no adequate basis for determining the scope of its own jurisdiction. Such uncertainty would jeopardize the Commission's ability to regulate sales at wholesale of interest power and to order, under appropriate circumstances, interconnections between utilities.

The Commission's power to compel interconnections under section 202 of the Act (16 U.S.C. 824a(b)), and its jurisdiction under sections 205 (16 U.S.C. 824d) and 206 (16 U.S.C. 824e) over sales at wholesale by private companies to the public power systems with which they are interconnected, are absolutely vital for the survival of many of the dispersed, publicly owned utility systems which meet an important portion of the Nation's electric energy needs. Many of these systems are members of the American Public Power Association. Both facets of the Commission's jurisdiction turn on the interpretation to be given to section 201 of the Act, the question at issue in this case.

The decision of the court below thus presents an important question of federal law which has not been, but should be, settled by this Court.

The American Public Power Association respectfully requests this Court to grant it permission to file its

annexed brief *amicus curiae* in support of the Commission's petition for writ of certiorari.

Respectfully submitted,

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BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

The American Public Power Association supports the petition of the Solicitor General for writ of certiorari.

The Association is a service organization representing more than 1,400 local publicly owned power systems in 48 States, Puerto Rico, the Virgin Islands and Guam.

These systems are vitally affected by the interpretation of section 201 of the Federal Power Act (16 U.S.C. 824), the issue presented by this case.

A high proportion of the local publicly owned power systems of the United States are dependent for crucial portions of their power supply, in some cases their entire supply, upon interconnections with privately owned power systems. They are also, in many cases, dependent upon such interconnections for reserve sources of power, to be made available in emergencies, and to be made available to permit scheduled shutdowns of equipment for maintenance. Moreover, to obtain the advantage of size of generating units, and thus reduce generating costs, smaller municipalities must have access, through interconnection, to generating plants far larger than they can afford for their individual requirements alone.

The jurisdiction of the Federal Power Commission to compel such interconnections under section 202 of that Act (16 U.S.C. 824a(b)), and to regulate the rates at which such power is supplied thereby, under sections 205 (16 U.S.C. 824d) and 206 (16 U.S.C. 824e), has been, and will be again, vital to the survival of many of the smaller municipally owned power systems.

This jurisdiction, in turn, depends on whether, in the instant case, the Commission or the Court of Appeals was right in interpreting section 201(b) of the Act; that is to say,

> (1) whether the participation of the Florida Power & Light Company (FPL) in an interstate power pool constituted the "transmission of electric energy in interstate commerce," thus characterizing that Company as a "public utility"

within the meaning of section 201(e), as the Commission held, or

(2) whether the exclusion of the Commission's jurisdiction which section 201(b) stipulates with respect to "facilities used in local distribution" deprives the Commission of all jurisdiction over all facilities and services of this member of that interstate power pool, as the court below believed.

By the terms of section 201(c), the test of whether electric energy is to be held to be transmitted in interstate commerce depends on whether it is "transmitted from a State and consumed at any point outside thereof." The Commission, applying its expertise to the facts in this case, held that this test of section 201(c) was met; the court held to the contrary.

The important point is thus presented, at the outset, as to whether this Court, for the first time, shall sanction a lower court's substitution of its own expertise, in a highly technical matter, for the expertise of the Commission.

The question so resolved was stated in this way in the Trial Examiner's notably lucid opinion (page references are to those of the Solicitor General's Petition for Certiorari, which annexes both the Commission's decision and that of the Examiner).

Page 69:

"Florida [Florida Power & Light Company] and the other members of the Florida Operating Committee are members of a multi-state electric network, the Southeast Region of the Interconnected Systems Group (ISG) which covers the southeastern and central portions of the country. Florida operates in synchronism with the 140 mem-

bers of ISG and is ready to assist them or to receive assistance from them in case of emergency. Thus during a 580 mw generator loss by a midwestern utility Florida contributed 8 mw to ISG."[1]

Pages 70-71:

"Under Section 201(c) of the Act electric energy is transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof within the United States. Granted that electric energy is transmitted between Florida and Corp [Florida Power Corporation], and between Corp and Georgia [Georgia Power Company], the question is posed: Is electric energy transmitted to Florida from Georgia or to Georgia from Florida? The answer depends on what constitutes interstate transmission of electric energy.

"Electric power on Florida, Corp, and Georgia and all other interconnected systems is supplied as alternating current at a frequency of 60 cycles. Interconnected synchronous operation, or "parallel operation," as the term is used in the industry, requires that the frequency of each system be in synchronism with that of all others in the interconnection. Two or more electric systems cannot (except under special and rare conditions) operate together unless they are in synchronism. This

[1] At p. 67, the Examiner says:

"Interchanges of power are measured, netted, and payment is made for the balance at regular intervals.

"In its 1965 Form 12 report Florida lists its reserve capacity at 656,000 kw, 411,000 kw from its own system, and in addition, from the other members of the Florida Operating Committee, 'Reserve capacity usually available amounts to 245,000 kw. This is spinning reserve instantly available for emergencies from Florida Power Corporation ["Corp"], Tampa Electric Company, City of Jacksonville and Orlando Utilities Commission.' Florida also contributes to the joint reserves of the other members of the Florida Operating Committee."

means that the current pulses on these systems, and thus the frequency, coincide exactly; not approximately, but exactly. Birmingham is served by Alabama [Alabama Power Company] which is interconnected with Georgia which is interconnected with Corp. Miami is served by Florida which is interconnected with Corp. The frequency of the pulses is exactly the same in Miami and Birmingham, and if it changes to a new value in Birmingham, then it change to exactly that same value in Miami. The speed of every electric generator on every electric system in an interconnected group is irrevocably locked to the same frequency. A variation in one affects all."

* * * * *

Page 75:

"Thus there is a free flow of power and energy throughout the electric network in which Corp and Georgia participate. There is also a free flow of power and energy throughout the electric network formed by Corp and Florida. And there is a free flow of energy among Georgia, Corp, and Florida.

"All 140 members of the ISG operate in parallel. All are interlocked electromagnetically and maintain the same frequency. Each member renders automatic assistance to the other in times of emergency. As previously noted, Florida can receive from or contribute to ISG up to 100 mw. The network formed by all the members of ISG and the tie line bias and frequency control used by member systems provide mutual assistance in maintaining standard 60-cycle frequency, thereby improving the efficiency of operation of all."

Pages 78-79:

"If a housewife in Atlanta on the Georgia system turns on a light, every generator on Florida's system almost instantly is caused to produce some quantity of additional electric energy which serves

to maintain the balance in the interconnected system between generation and load. If sensitive enough instruments were available and were to be placed throughout Florida's system the increase in generation by every generator on Florida could be precisely measured.

"Nobody can say for certain just how electricity is really transmitted. The analogy to a flow of water is metaphorical only. Does an electron move from one end of a thousand mile wire to another? Or is there only interaction between neighboring electrons or between fields of force? The answer is not important for legal purposes. The significant factors are that Florida's generators are interlocked electromagnetically with Georgia's and that in consequence, Florida's generators increase their production of electric energy almost instantaneously and automatically in response to increases in load on Georgia's system thereby contributing in some measure to the system supply which meets the increased Georgia load, reducing the variation in frequency on the Georgia system, and increasing its efficiency of operations. Without the Florida response the electric reactions on Georgia and the interconnected systems would be different.

"The cause and effect relationship in electric energy occurring throughout every generator and point on the Georgia, Corp and Florida systems constitutes interstate transmission of electric energy by, to, and from Florida. It is the electromagnetic unity of response of Florida, Corp, Georgia and other interconnecting systems that constitutes the interstate transmission of electric energy by Florida."

The Commission, exercising its expertise, sustained the Examiner's engineering concept and his conclusion of law based thereon. The court rejected both, impliedly adopting instead FPL's theory. Never very

clearly explained below, this was called the "system studies method." The Examiner had rejected it as an invalid engineering exercise, for these reasons:

Page 81:

> ". . . Thus in the systems studies method, the flow of electric energy instant by instant in the bus is treated as constant in magnitude and as being in a single direction. This result is achieved by taking the algebraic sum of the magnitudes and directions of each of the three power phases and using the combined value of three phase power as representative of the power flow.
>
> "This unidirectional combined value of three phase power is purely a mathematical concept."

Page 82:

> "The systems studies method is used for certain types of engineering studies. For these purposes the use of unidirectional combined values is satisfactory because all that is desired is a mathematical answer regardless whether it is in consonance with the physical dynamics of the situation. The combining of magnitudes and directions is similar to the technique of averaging. Both are meaningful methods of representing certain aspects of data. Thus average per capita income can be a useful concept. But on the basis of average per capita income, there are no poor in the United States. The average is not fully descriptive of the reality, which is a range of incomes from poor to rich. Similarly, the combining of magnitudes and direction of each of the three phases does not provide an adequate description of the dynamic phenomena that occur in a three phase bus which serves as a junction for numerous three phase lines."

It seems manifest, at least to us, that this case presents exactly the type of problem that Congress en-

trusted to the expertise of the Commission, and the Commission's determination that these interconnections established the interstate transmission of energy is conclusive. The question of whether this Court, for the first time, shall sanction the substitution by a lower court of its own expertise for that of the Federal Power Commission is itself a particularly important question of law.

The Examiner likewise held, and the Commission agreed, that the whole huge Florida Power & Light Company system did not constitute "facilities used in local distribution," excluded from the Commission's jurisdiction. He found, and the Commission agreed, that:

Page 86:

> "Florida has a transmission grid of 2,500 miles, of which 1,400 are high voltage, 115 kv or above. There are 1,100 miles of transmission facilities used for local distribution. The 1,400 miles of high voltage lines are anterior to distribution to local consumers and are not 'facilities used in local distribution.' "

The court held otherwise.

The conclusion of the court below that, on these facts, Florida Power & Light Company is not to be deemed to be engaged in interstate commerce within the meaning of section 201 of the Federal Power Act raises a question of law of Nation-wide importance. It is a particularly grave question because the protection of the Nation against "black-outs" and power shortages requires the interstate interconnection of the Nation's power systems which make possible the pooling of reserve capacities in different States just as was done

here. The jurisdiction of the Commission to coordinate these activities is essential to the national welfare. This kind of interstate commerce is particularly in need of federal regulation. But the lower court's decision opens the door to wholesale evasion of the Commission's jurisdiction by the creation of buffer corporations which may own and operate the facilities which overlap State lines, through which, in turn, interconnections are made with companies on each side of the line, thereby securing the advantages of interstate power pools free of federal regulation.

The petition for certiorari should be granted.

Respectfully submitted,

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